to cross-examine in one case PW5 and to re-examine DW1 in the other. That counsel for the appellant had failed to do so with two witnesses in the instant case seems to me to be clear on the record and I hold that this contention of his also fails.

It is perhaps right to observe here that it is not a proper use of a counsel's discretion to raise no objection at the time in order to preserve a ground or objection for a possible appeal. (See *R.* v. *Stirland*[6]).

Next, the Court of Appeal decision in *Sulong bin Nain* v. *Public Prosecutor*[7] also involving the carrying of firearms and ammunition has been cited by both counsel. In that case, the offence was under section 3 of the Public Order and Safety Proclamation (briefly referred to as "the Proclamation") which reads: —

"3.(1) *Any person who carries arms* shall on conviction be punishable with death or with penal servitude for life or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine....

(2) The Officer Commanding the Civil Affairs (Malaya) Police Force may in his discretion by Permit in writing exempt any person from the provisions of this section."

Section 13(1) of the Ordinance under which the appellant is charged reads: —

"13.(1) Subject to the provisions of section 17, *no person shall have in his possession or carry or use any firearm or explosive* except under a licence or permit....

16. *Any person who possesses, carries or uses any firearm or explosive* except under a licence or permit..."

It was contended by counsel for the defence that to equate and fasten strictness of section 13 of the Ordinance with section 3 of the Proclamation is wrong. *Sulong's* case, he says, was during the emergency, and the facts of that case are entirely different from those of the present and as such that decision can have no application here. There is no doubt of course that that distinction between the two cases does exist, but on consideration I cannot think that that distinction makes any difference in principle.

It seems clear that the prohibition contemplated by the provisions of the Proclamation and the Ordinance above referred to is absolute. The legislature rightly regarded carrying arms without a licence as one of the serious evils in society. The possibility of chaos and disorder that uncontrolled arms possession may cause in our country needs no emphasis. It is for this reason that the statute prohibits absolutely the acts defined as constituting an offence, in the sense that there is no obligation on the part of the prosecution to prove *mens rea*, if the events postulated in the sections occur.

I can see nothing in PW5's evidence nor in the appellant's testimony which brings the appellant's case within the ambit of either section 76 or 79 of the Penal Code.

That accused person belonged to the disciplined force and had been employed as a police officer from 1965 to 1973, totalling some eight years, has been established in evidence.

And there is the very significant circumstance in which the accused on his own showing said that he did not bury the shot gun because he knew it was lawful for him to carry it, but buried the rifle for which he had no licence.

If anything, the possession by accused for nearly three months both of the rifle and the ammunition, and his position as a police officer makes the offence the more serious. And there is nothing in the evidence of either DW1 or PW5 that contradicts the prosecution case.

The existence of a *bona fide* intention, or a technical act done in good faith is in my view no answer to the charge but is a matter only for mitigation of the penalties that may be imposed but not to the guilt itself.

That consecutive sentences passed for possession of arms and ammunition were justifiable and proper is supported by the decision in *R.* v. *Faulkner*.[8] (See also *Marimuthu* v. *Public Prosecutor*[9]).

For each and all these reasons I have given, I can find nothing in the law or in the authorities to which the court has been referred to justify the conclusion to which the counsel for appellant invites me to come. The appeal is accordingly dismissed.

Appeal dismissed.

Solicitors: *Rayner & Co.*

SALLEHUDDIN BIN YAHYA v. PUBLIC PROSECUTOR

[O.Cr.J. (Tan Chiaw Thong J.) October 26, 1978]
[Sibu — Criminal Application No. 6 of 1978]

Dangerous Drugs — Indian hemp — Possession of — Prosecution must prove that it was Indian hemp within meaning of Dangerous Drugs Ordinance — Dangerous Drugs Ordinance, 1952, ss. 2 & 6.

Criminal Law and Procedure — Application to reserve questions of law for Federal Court — Scope of s. 66(1) & (6)(a) of Courts of Judicature Act, 1964 — Court's discretion — Retrial — When retrial may be ordered — Criminal Procedure Code (F.M.S. Cap. 6), s. 316 — Dangerous Drugs Ordinance, 1952, ss. 2 & 6 — Courts of Judicature Act, 1964, s. 66(1) & (6)(a).

The applicant in this case was charged in the lower court with possession of Indian hemp. The Government chemist gave evidence in court that he analysed the contents of 40 of the 198 rolls handed to him for analysis and he found them to be cannabis. He further stated that cannabis was also known as Indian hemp and also known as ganja. No one involved in the trial took the trouble to ascertain from him whether the Indian hemp mentioned by him was that which falls within the definition of "Indian hemp" in section 2 of the Dangerous Drugs Ordinance.

The applicant applied under section 66(1) and (6)(a) of the Courts of Judicature Act, 1964 to have reserved for the decision of the Federal Court alleged questions of law of public interest which had arisen in the course of the appeal of the applicant against his conviction.

The court ordered a re-trial and the applicant argued that it was in conflict with authorities cited.

Held: (1) section 316(b) of the Criminal Procedure Code gives an appellate court a discretionary power in suitable cases to order a retrial;

(2) in a trial of this sort, when the substance analysed was described as Indian hemp by the expert witness, he should have been asked to clarify whether the Indian hemp

stated by him was of the type as defined in section 2 of the Dangerous Drugs Ordinance;

(3) if the chemist had been asked to elaborate on what was meant by the Indian hemp mentioned in his evidence, there was nothing to suggest that his answer would invariably be that the Indian hemp meant the type of Indian hemp as defined in section 2 of the Dangerous Drugs Ordinance. The point should in the interests of justice have been clarified in the lower court;

(4) hence, as in this case, where an appellate court considers that it is in the interests of justice which do not prejudice the appellant, the appellate court has the discretionary power to order a re-trial in an appeal;

(5) the questions posed did not involve any question of law of public interest as required by section 66(1) of the Courts of Judicature Act. No reference to the Federal Court should therefore be allowed.

Cases referred to:-

(1) *Teoh Soo Tok* v. *Public Prosecutor* [1961] M.L.J. 74.
(2) *Ho Kiat Swee* v. *Rex* [1947] M.L.J. 159.
(3) *Lo Fat Thjan & Ors.* v. *Public Prosecutor* [1968] 1 M.L.J. 274.
(4) *Matukdhari Singh* v. *Janardan* A.I.R. 1966 S.C. 356, 358.
(5) *Rajeswar Prasad* v. *The State of West Bengal & Anor.* A.I.R. 1965 S.C. 1887, 1891.
(6) *Rex* v. *Grondkowski* [1946] 1 K.B. 369, 372.
(7) *Liew Kaling & Ors.* v. *Public Prosecutor* [1960] M.L.J. 306, 309.

CRIMINAL APPLICATION.

Joseph Tang for the applicant.

Abdul Hamid bin Yusof (Deputy Public Prosecutor) for the respondent.

Tan Chiaw Thong J.: By this notice of motion the applicant applies under section 66(1) and (6)(a) of the Courts of Judicature Act, 1964 to have reserved for the decision of the Federal Court what purports to be certain questions of law of public interest which had arisen in the course of the appeal of the applicant against his conviction for an offence punishable under section 6 of the Dangerous Drugs Ordinance, which has been disposed of by this court by ordering a retrial of the applicant. The purported questions of law set out in the notice of motion are 5 in number, but in the course of the hearing of the application, learned counsel for the applicant abandoned the application in respect of the first three questions and the hearing of the application proceeded on the basis of it being confined to two questions, namely, questions 2(a) and 2(b) as set out in the notice of motion. The two questions read as follows: —

"2(a) Can an appellate court order a retrial under section 316 of the Criminal Procedure Code in respect of charge under section 6 of the Dangerous Drugs Ordinance when the only evidence produced by the Government chemist witness for the prosecution did not sufficiently prove that the articles found on the accused was Indian hemp within the meaning of the Dangerous Drugs Ordinance?

(b) In this present case, was the discretion to order a retrial by the court rightly exercised?"

I shall deal with this application on the assumption that the two questions posed fulfil the requirements of section 66(1) of the Courts of Judicature Act, 1964 to the extent that they had arisen in the course of the appeal and the determination by the appellate judge had affected the event of the appeal. I shall come to the question as to whether the questions posed are questions of law of public interest later in this judgment.

Section 66(1) and (6)(a) of the 1964 Act respectively read: —

"66. (1) When an appeal from a decision of a subordinate court in a criminal matter, other than a decision of a President of a Sessions Court conferred with special jurisdiction under subsection (3) of section 63 of the Subordinate Courts Act, 1948, has been determined by the High Court the judge may on the application of any party and shall on the application of the Public Prosecutor reserve for the decision of the Federal Court any question of law of public interest which has arisen in the course of the appeal and the determination of which by the judge has affected the event of the appeal.

(6) For the purposes of this section but without prejudice to the generality of its provisions —

(a) any question of law regarding which there is a conflict of judicial authority shall be deemed to be a question of public interest."

In support of the application learned counsel for the applicant submits that since the only evidence relating to the alleged Indian hemp in respect of which the applicant was charged in the lower court with having possession was that of the Government chemist and such evidence in the lower court did not sufficiently prove that the substance was Indian hemp as defined in section 2 of the Dangerous Drugs Ordinance, the order of retrial of this court is in conflict with two authorities, namely, the cases of *Teoh Soo Tok* v. *Public Prosecutor*[1] and *Ho Kiat Swee* v. *Rex*.[2] That is the sole ground on which the application is based. It is therefore relevant to consider whether in ordering a retrial, this court has made an order which conflicts with the decisions in the *Teoh Soo Tok* and *Ho Kiat Swee* cases or either of them. Before dealing with this question, I would point out that section 316(b) of the Criminal Procedure Code gives an appellate court a discretionary power in suitable cases to order a retrial. That the power is discretionary is not disputed and indeed beyond argument.

In the appeal of the applicant I had dealt, in my judgment, with the question of the evidence of the expert witness Chan Woon Peng (PW2) in the lower court. His evidence was to the effect that when he analysed the contents of 40 of the 198 rolls handed to him for analysis, he found them to be cannabis. This was confirmed in his written report. He further stated that cannabis was also known as Indian hemp and also known as ganja. In the lower court, based on the record of proceedings, it is an undoubted fact that no one involved in the trial took the trouble to ascertain from PW2 whether the Indian hemp mentioned by him was that which falls within the definition of "Indian Hemp" in section 2 of the Dangerous Drugs Ordinance. Indeed, it seems clear that that point was not expressly present in the mind of the learned trial magistrate when he dealt with the matter in his judgment; nor was it brought expressly to his attention. In the last paragraph of his judgment at page 99, he dealt with the evidence of Chan Woon Peng (PW2) where he stated: "He, in his evidence, stated that the drug after chemical analysis he found them to be cannabis or Indian hemp (Exhibit P6). The 198 rolls of ganja weighed 313 grammes. He stated that it is a habit growing drug, producing duplthfloria, hallucination and drowsiness. I accept his evidence as that of the chemist in his own spe-

cialised field of chemical analysis." It is equally clear from the record of proceedings that the defence counsel did not take the point which was raised in the appeal relating to the definition of Indian hemp in section 2 of the Dangerous Drugs Ordinance.

Learned counsel for the applicant has stated that the case of *Teoh Soo Tok* v. *Public Prosecutor, supra,* has laid down a general principle relating to circumstances under which a retrial is not appropriate in an appeal and he submits that in ordering a retrial in this case, the order of this court conflicts with the decision of the principle as laid down in the *Teoh Soo Tok's* case. In that case, the headnote reads: —

"The appellant was charged with unlawful possession of more than 40 lbs. of Indian hemp and was convicted and fined $1,000 or 6 months imprisonment in default of payment. It was argued for the appellant that although the substance found on the appellant formed a part of a species of a plant or plants known as CANNABIS SATIVA it did not constitute the finished product known as Indian hemp as defined in section 2 of the Dangerous Drugs Ordinance, 1953.

Held: (1) the mere fact that the plants were of a species known as cannabis sativa did not justify the inference that they were Indian hemp within the meaning of the Ordinance;

(2) although he was in possession of something from which Indian hemp might be constituted or manufactured, there was no adequate evidence upon which he could properly be convicted of unlawful possession of Indian hemp or an ascertained quantity of Indian hemp."

In that case the question of the sufficiency of the evidence of the chemist who did the analysis was not only raised at the appellate stage but was also argued in the lower court. The appeal therefore clearly proceeded on the basis that the point raised in the appellate court was not a new point raised and in effect it was an appeal which turned on the point raised in the lower court which the appellate court held to have been wrongly rejected by the lower court, which is not the case here. Further, in the *Teoh Soo Tok's* case, what the appellate court found unconvincing was that the chemist said that he had carried out tests which satisfied him that the exhibits were from the plant known as Cannabis Sativa; and the appellate court in its judgment stated that this was open to the construction that because the plants were of the species known as Cannabis Sativa, then it followed as a necessary inference or consequence that they were Indian hemp within the meaning of the Ordinance. Further, the appellate court stated that in the absence of cross-examination and in the ordinary case, no doubt the evidence of the chemist would reasonably and properly have been held to be sufficient to satisfy a court that the substance found was Indian hemp. However, as already stated, the point was not only raised at the appellate stage but also taken in the lower court, and the appeal turned on this main point, namely, that what the lower court considered to be sufficient evidence as to the proof of Indian hemp as defined in section 2 of the West Malaysian Dangerous Drugs Ordinance, 1953 was considered to be insufficient by the appellate court. It is to be noted that the nature of the evidence given by the chemist in that case was not on all fours with the evidence given by PW2 in the instant case, because PW2 in the lower court did state that the 40 rolls analysed by him was also known as Indian hemp.

Further, in the case of *Lo Fat Thjan & Ors.* v. *Public Prosecutor,*[3] the Federal Court stated (at page 276) that the following sentence contained in the judgment of the appellate judge in the *Teoh Soo Tok's* case, namely, "No evidence was given by him (the chemist) that they were pistillate as distinct from staminate plants, nor was any test carried out or evidence given by him as to whether or not the resin — assuming they contained resin — had, in fact, been extracted", must be read in its own context, and in the light of the facts peculiar to that case. It seems absolutely clear to my mind that in a trial of this sort, when the substance analysed was described as Indian hemp by the expert witness, he should have been asked to clarify whether the Indian hemp stated by him was of the type as defined in section 2 of the Dangerous Drugs Ordinance. Otherwise, if this is not done, how is a trial court to determine this question which it must do. The unfortunate thing, as I have said, is that no one involved in the trial including the learned trial magistrate clarified this from the witness which in my view should have been done. I do not therefore read and consider the *Teoh Soo Tok's* case as laying down any general principle covering the decision made by this court. I do not therefore consider that my decision in ordering a retrial in the circumstances is in conflict with the decision in the *Teoh Soo Tok's* case. Learned counsel for the applicant has also cited the case of *Ho Kiat Swee* v. *Rex, supra,* the headnote of which reads: —

"In this case the prosecution put in a certificate to show that an article in question was chandu. The certificate did not show that the chemist who signed the certificate analysed the articles sent to him or any one of them; nor did it show that when he referred to the articles as Chandu he was aware of the technical definition of the word "Chandu" in the Proclamation and was satisfied that it came within that definition.

Held, that the certificate was an insufficient one and as it was the only evidence for the prosecution that the article found on the accused's premises was chandu, the result was that the prosecution had not proved its case and the conviction must be quashed."

The first thing to observe is that whereas the chemist in this case gave evidence in court, all that was adduced by the prosecution in the *Ho Kiat Swee's* case was a certificate of the chemist concerned. With respect, having regard to the facts as disclosed in the judgment in that case, it is not surprising in my view that the appellate court merely quashed the conviction. It was found that the certificate was insufficient because firstly, it did not show that the chemist who signed the certificate analysed the articles sent to him or any one of them; and secondly, it did not show that when he referred to the articles as chandu, he was aware of the technical definition of the word "chandu" in the Proclamation and was satisfied that it came within that definition. In this case the evidence shows that the chemist PW2 analysed at least 40 rolls of the articles sent to him and further, as I have stated, he did mention that the result of his analysis was that the substance analysed by him was cannabis which was also known as Indian hemp. I do not consider that the *Ho Kiat Swee's* case lays down any principle of general application. I read it to be a decision based on the facts of that particular case. It is clear that the discretion conferred

upon an appellate court by section 316 of the Criminal Procedure Code is, as already mentioned, discretionary. How that discretion is to be exercised would depend upon the particular circumstances of the particular cases coming before an appellate court. In the case of *Matukdhari Singh* v. *Janardan*[4] at p. 358 paragraph 7, the Indian Court stated that it has pointed out that a retrial may be ordered for a variety of reasons which it is hardly necessary or desirable to state in a set formula and the observations of that court are illustrative but not exhaustive. Further, "The Code gives a wide discretion and deliberately does not specify the circumstances for the exercise of the discretion because the facts of cases that come before the courts are extremely dissimilar. We pointed out that it would not be right to read the observations of this court (intended to illustrate the meaning of the Code) as indicating in advance the rigid limits of a discretion which the Code obviously intended should be developed in answer to problems as they arise. We gave some illustrations of our own which fell outside those observations but which might furnish grounds, in suitable cases, for an order of retrial." In the case of *Rajeswar Prasad* v. *The State of West Bengal & Anor.*[5] at page 1891 paragraph 8, the Indian Court stated: —

"But the Code contemplates that a retrial may be ordered after setting aside the conviction or acquittal (as the case may be) if the trial already held is found to be unsatisfactory or leads to a failure of justice. In the same way, the Code gives a power to the appellate court to take additional evidence, which for reasons to be recorded, it considers necessary. The Code thus gives power to the appellate court to order one or the other as the circumstances may require leaving a wide discretion to it to deal appropriately with different cases."

At page 1892 in the same paragraph the court went on to say: —

"Cases may arise where either of the two courses may appear equally appropriate. Since a wide discretion is conferred on appellate courts, the limits of that courts' jurisdiction must obviously be dictated by the exigency of the situation and fair play and good sense appear to be the only safe guides. There is, no doubt, some analogy between the power to order a retrial and the power to take additional evidence. The former is an extreme step appropriately taken if additional evidence will not suffice."

It should be mentioned here that the corresponding provisions in the Indian Code of Criminal Procedure giving power to an appellate court to order a retrial are in substance similar to section 316 of ours. It seems clear therefore on the authorities that where an appellate court considers that it is in the interests of justice which do not prejudice the appellant, the apellate court has the discretionary power to order a retrial in an appeal. In this respect, it would be just as well to remind oneself that "The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of the prisoners" (*per* Lord Goddard C.J. in the case of *Rex* v. *Grondkowski*,[6] quoted with approval by the then Federation Court of Appeal in *Liew Kaling & Ors.* v. *Public Prosecutor*[7]).

I would reiterate that had the proceedings in the lower court showed that if the chemist PW2 had been asked to elaborate on what was meant by the Indian hemp mentioned in his evidence there is nothing to suggest that his answer would invariably be that the Indian hemp meant the type of Indian hemp as defined in section 2 of the Dangerous Drugs Ordinance. It could well be otherwise; or it could be that when he had mentioned the Indian hemp he had not in mind the statutory definition of that expression. Quite clearly, therefore, in the interests of justice the point should have been clarified in the lower court which was not done, because, as I have stated, in the absence of clarification, how was a trial court to make a proper decision on the charge against the applicant.

Hence, for the reasons given, I do not consider that the questions posed involve any question of law of public interest, one of the requirements set down in section 66(1) of the 1964 Act. For the same reasons, I do not consider that the questions posed should be referred to the Federal Court for decision. Accordingly, the application is refused.

Since the decision of the appeal, some water had already flowed under the bridge and I consider that it would be in the interests of all parties concerned that the retrial should take place as soon as possible and accordingly, I order an early retrial.

Order accordingly.

Solicitors: *Tang & Co.*

IDRIS BIN HAJI SALLEH v. FEDERAL AUTO HOLDINGS BHD.

[O.C.J. (Syed Agil Barakbah J.)
October 28 and December 9, 1978]
[Alor Star — Civil Suit No. 186 of 1976]

Practice and Procedure — Pleadings — Defence filed out of time — Application for extension of time to file defence — Court's discretion to decide on merits — R.S.C. 1957, O. 21 r. 6, O. 27 r. 11.

The plaintiff, a contractor, entered into a hire-purchase agreement with the defendants whereby they let a Volvo wheel-loader to the plaintiff. Subsequently, the plaintiff found that the machine was defective. As a result, he could not carry out his contract work satisfactorily and thereby suffered loss. The plaintiff claimed against the defendants rescission of the said agreement, return of the sum of $42,000 and damages for breach of contract.

The writ was served on the defendants on July 11, 1976. The defendants filed appearance on July 17, 1976. On the request of their solicitors, the defendants were given a month's grace from July 17, 1976 to file their defence, and on further request were allowed another week to do so. However, the defendants failed to file their defence. On August 26, 1978 the plaintiff filed a notice of motion for judgment in default of defence. On October 28, 1978 the defendants applied for an extension of time to file the defence.

Held: (1) a defence delivered after the proper time cannot be disregarded even though it is not delivered until after the plaintiff has served notice for judgment under the rule. In such a case, the court will have regard to the contents of the defence delivered out of time and deal with the case in such a manner that justice can be done;

(2) in the present case, judgment in default had not been obtained. The courts in a case of this nature prefer that it be decided on merits and do not invoke procedural rules to prevent a defendant from defending an action unless it has no merits in his application.

Cases referred to:-

(1) *Gill* v. *Woodfin* (1884) 25 Ch. D. 707, C.A.